

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

To be argued by
JOHN F. MARTIN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-6184

WILLIAM S. HERRMANN,

Plaintiff-Appellant,

-against-

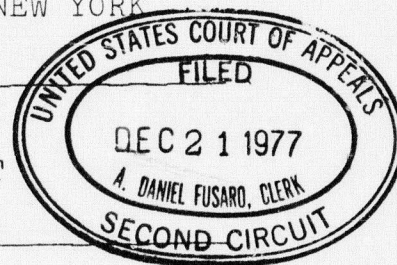
LEONARD P. MOORE, ET AL.,

Defendants-Appellees.

P/S

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT



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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 77-6184

WILLIAM S. HERRMANN,

Plaintiff-Appellant,

-against-

LEONARD P. MOORE, ET AL.,

Defendants-Appellees.

BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

This is an appeal from an Order and Judgment of the United States District Court, Eastern District of New York (Pratt, J.) entered October 19, 1977 which "ORDERED and ADJUDGED that plaintiff take nothing of the defendants and that the complaint is dismissed."

Plaintiff instituted an action against defendants in the United States District Court, Eastern District of New York by the filing of a complaint therein alleging violation of his rights under the First, Fifth and Fourteenth Amendments of the Constitution and under Title 42 U.S.C. Sections 1983 and 1985. Jurisdiction in the federal court was alleged under Title 28 U.S.C. Sections 1331, 1332 and 1343. (App. 14).

An outline of the action in the Court below is that defendants conspired together to and did cause plaintiff to be dismissed from his position as a tenured professor of law at Brooklyn Law School:

1. To intimidate, retaliate against and injure him because he was a party and a witness in the United States District Court, Eastern District of New York, in an action brought by him against Raymond E. Lisle, et al. under docket no. 75C130; (App. par. 16, p. 16; par. 17, p. 283; par. 20, pp. 285, 286; par. 21, pp. 286, 287, 288; par. 30, p. 292);

2. Because of plaintiff's exercise of his right of free speech and his opposition to the practice of racial discrimination that existed at Brooklyn Law School. (App. par. 16, p. 16; par. 25, p. 19; par. 43, pp. 306, 307);

3. Because of plaintiff's performance of his duty as an attorney-at-law and an officer of the court. (App. par. 24, pp. 289, 290);

4. All in violation of plaintiff's rights under the Constitution and 42 U.S.C. Sections 1983, 1985 (2)(3). For copies of the resolution of the board of trustees and the charges upon which plaintiff was removed from the faculty of Brooklyn Law School as a tenured professor of law see Appendix 340-354; 86-88; 125-134; 156-160.

5. The plaintiff further stated that Justice Edward Thompson, a Justice of the Supreme Court of the State of New York, who was functioning as Administrative Judge of the Civil Court of the City of New York, acting under color of law acted and conspired with the other defendants in regard to the foregoing and to defeat, impede and obstruct justice in the Civil Court of the City of New York in an action in that court by plaintiff against Joseph Crea for defamation and a counterclaim by Mr. Crea against

plaintiff for defamation. (App. 17, par. 11, p. 279, 280, 325; par. 40, p. 302-305).

6. The defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b) claiming basically:

(a) that there was no state action either because Brooklyn Law School is a private institution (App. 228-250) or because the judges who acted herein including Judge Thompson have immunity and their immunity protects all the conspirators. (App. 251, 252, 596-599, 606, 607, 608);

(b) that there was no class-based invidious discriminatory animus in their conspiracy to intimidate, retaliate against and injure plaintiff. (App. 253-262, 601, 608).

(c) that there was no conspiracy because all of the parties are really one and a conspiracy requires two people. (App. 263-265).

7. The defendants did not deny their activities but used arguments to traverse the facts. They go so far as to admit Judge Thompson's role but claim it is not as bad as what the judge did in the case cited in plaintiff's memorandum of law submitted in the Court below. (App. par. 2 and footnote pp. 607, 608).

8. The Court below ignored the defendant's argument that there was no conspiracy and found one (App. 10) but said it was a conspiracy to deny free speech and not actionable. (App. 10). It found a conspiracy to intimidate, retaliate against and injure plaintiff for being a party and a witness but said it was not actionable because the first action plaintiff brought some two years before was in a state court (App. 9) and it found state

action by Judge Thompson but held plaintiff was not damaged by it and this also was not actionable. (App. 8, 9).

ISSUES PRESENTED

1. Did the Court below err in finding that the appellees' conspiracy to intimidate, retaliate against and injure appellant for being a party and a witness in a court of the United States was not actionable because the first action brought by appellant two years before action was taken to remove him from the faculty was brought in a state court?

2. Did the Court below err in finding that a conspiracy to deny freedom of expression was not actionable?

3. Did the Court below err in finding appellant's championing of rights of minorities at Brooklyn Law School was not protected under the Civil Rights Act?

4. Did the Court below err in finding that Judge Thompson's actions in his official capacity as a judge under color of law were not actionable because they did not damage appellant?

5. Did the Court below err in dismissing the complaint with prejudice?

Point I

THE DOCUMENTARY EVIDENCE IS CLEAR THAT APPELLEES CONSPIRED TO AND DID INJURE APPELLANT IN VIOLATION OF THE CONSTITUTION AND THE CIVIL RIGHTS ACT SECTION 1985. THE FACTS AND LAW SUPPORT THE ALLEGATIONS OF THE COMPLAINT THAT SUCH UNLAWFUL CONSPIRACY EXISTS.

A. Appellees conspired to intimidate, retaliate against and injure appellant because he was a party and a witness in a federal court.

1. The law seems clear that the first half of 42 U.S.C. Sec. 1985(2): aims at conspiracies the object of which is intimidation, retaliation against or injury to parties, witnesses or grand or petit jurors in any court of the United States; that said section of the Civil Rights Act reaches and covers private action and provides for the recovery of damages by the person injured against one or more of the conspirators and that no class-based invidiously discriminatory animus is required under this section of the Civil Rights Act but the federal nexus is the connection of the proscribed activities to a federal court. Brawer v. Horowitz, 535 F2d 830, 840; Crawford v. City of Houston, Texas, 386 F. Supp. 187, 192; Kelly v. Foreman, 384 F. Supp. 1352.

The reason for and justice of the above set forth law was, it is submitted, well stated by the Court in Kelly v. Foreman, 384 F. Supp. 1352 at 1355 as follows:

"It is logical to assume that Congress intended by the language of sec. 1985(2) before the semicolon to protect specific activities vital to the functioning of courts of the United States, without requiring any allegation or proof of invidious discrimination."

2. The Court below while in its Memorandum and Order dated October 19, 1977 found the conspiracy (App. 10) and cited, referred to and agreed with the law as set forth above in regard to 42 U.S.C. 1985(2) (App. 9) it failed to recognize the significance of its own findings, disregarded the sworn statements and exhibits of the appellees filed in the Court below and overlooked the patent documentary proof that appellant was intimidated, retaliated against and injured by being dismissed from his position as a tenured professor of law because he was a party and a witness in a federal court.

3. In regard to appellant's claim under 42 U.S.C. sec. 1985(2) the Court below stated:

"With regard to the section 1985 claim, defendants have argued that the plaintiff has failed to state a cognizable claim because there is no 'class-based invidiously discriminative animus'. Griffin v. Breckenridge, 403 US 88 (1971). In response, plaintiff cites Brawer v. Horowitz, 535 F2d 830, 840 (CA3 1976), to demonstrate that the federal nexus of section 1985(2) need not be class-based, but may be merely 'the connection of the proscribed activities (detering by intimidation or threat and injuring a party on account of his attending and testifying in a court of the United States) to a federal court.' This reliance is misplaced, however, since the original cause of action here was initiated in state court. See Herrmann v. Crea, filed April 2, 1973 (NY Civil Court)." (App. 9).

4. The reference of the Court below to Herrmann v. Crea and its finding that because of it appellant is deprived of the protection of the Constitution and laws of the United States is an enigma.

5. Herrmann v. Crea was a defamation action

started in the Civil Court of the City of New York and no disciplinary proceedings were instituted for bringing that action in 1973.

B. The documents and affidavits of the defendants-appellees filed in the Court below and the findings themselves of the Court below establish that defendants-appellees conspired to intimidate, retaliate against and injure plaintiff-appellant because he was a party and a witness in a federal action, to wit, Herrmann v. Lisle, et al., United States District Court, Eastern District of New York, Docket No. 75CIV130.

Documentary Proof Filed In Court
Below By Defendants-Appellees

1. The first disciplinary proceedings instituted against appellant was instituted some two years after Herrmann v. Crea was filed in the Civil Court of the City of New York and made no mention of that action. It was directed to the federal action as sworn to in appellees' affidavit, verified by Raymond E. Lisle February 15, 1977 filed in the Court below in support of appellees' motion to dismiss. Mr. Lisle in the affidavit stated that the law school's board of trustees undertook to consider whether or not the federal litigation was undertaken in good faith and to that end, a Special Committee of the Board of Trustees was formed. (App. 30).

2. Filed as Defendants' Exhibit D in the Court below and attached to the said affidavit verified by Raymond E. Lisle is the Petition of the Special Committee of the Board of Trustees dated March 13, 1975 to the Faculty Hearing Committee, Brooklyn Law School. (App. par. 15 p. 32; 79-84).

Said Petition deals only with and is directed only at the action of Herrmann v. Lisle, et al. in the United States District Court, Eastern District of New York, Docket No. 75Cl30. (App. 79-84) and a copy of the complaint filed in such action is attached to the Petition (App. 80).

The Faculty Hearing Committee was directed to determine immediately whether the statements in the Petition of the Special Committee of the Board of Trustees regarding the federal litigation "warrant commencing proceedings leading to the removal of Professor Herrmann from the faculty of Brooklyn Law School." (App. 83, 84).

Significance Of The Findings Of Court
Below In Its Memorandum And
Order Dated October 19, 1977

1. In its conclusion that appellant should be deprived of the protection of 42 U.S.C. sec. 1985(2), "since the original cause of action here was initiated in state court. See Herrmann v. Crea, filed April 2, 1973 (NY Civil Court)" (App. 9) the Court below failed to recognize the significance of its own findings.

In its Memorandum and Order dated October 19, 1977 (App. 3-10) the Court below found:

"On May 19, 1975 the board met, considered the faculty resolution, and resolved 'to have the entire faculty of the law school conduct a hearing on whether or not the federal litigation begun by plaintiff was instituted to intimidate and coerce other members of the faculty.'" (App. 5, emphasis added).

2. The resolution of the board of trustees of

Brooklyn Law School dated May 19, 1975 to which the Court below referred in its findings as set forth above (App. 5) was filed as Defendants' Exhibit E in the Court below. (App. 86). It directs the faculty to conduct a hearing on five items regarding appellant and to report whether appellant should remain as a tenured professor of law. Four of the five items concern court proceedings and the fifth is a catch all, "As to any and all other conduct of Professor Herrmann which in the opinion of the faculty, reflects upon his fitness to remain a member of the Brooklyn Law School faculty. . . ." (App. 86, 87).

3. Item numbered "1" of the said resolution of May 19, 1975 is self-evident that the intent of the appellees herein was to intimidate, retaliate against and injure appellant because he was a party in a lawsuit in a federal court. It reads as follows:

"RESOLVED, that the faculty of Brooklyn Law School is requested to conduct a hearing on the following matters:

1. Whether Professor William S. Herrmann, Jr., in commencing a litigation entitled William S. Herrmann, Jr., v. Raymond E. Lisle, Joseph Crea, Philip K. Yonge, and David G. Trager in the United States District Court for the Eastern District of New York, Civil Action File No. 75Cl30, was proceeding on reasonable grounds in the proper assertion of lawful rights, or whether he intended by said litigation wrongfully to intimidate and coerce members of the faculty and the administration of the Law School for his own advantage;" (App. 86, 87, emphasis added).

4. Items numbered "2" and "3" of said resolution dated May 19, 1975 refer to the presentation of evidence by appellant to the United States District Court for the Eastern District

of New York in the course of the action in item numbered "1" above which the appellees alleged were confidential and should not have been put in evidence by appellant in a federal court. (App. 87).

5. For the clear intent of said items numbered "2" and "3" see paragraphs 17 and 18 of the affidavit of defendants-appellees by Raymond E. Lisle (App. 32, 33) wherein he swears:

"during the hearing before Judge Costantino, (in the United States District Court for the Eastern District of New York) certain documents were referred to by plaintiff Herrmann's attorney which were confidential in nature and could not have been in the possession of either plaintiff or his attorney except by reason of a violation of the confidentiality of matters referred to the Faculty Hearing Committee." (App. 32).

6. Item numbered "4" of said resolution concerns a matter which was before the Committee on Character and Fitness of Applicants to the Bar of the Supreme Court, State of New York, Second Department, another judicial proceeding, (App. 87) and as to which matter appellant was under a duty as an officer of the court to disclose such information as he knew concerning the applicant. Canon 1, Code of Professional Responsibility. Further, the Appellate Division requests such information. (App. 402).

7. Item numbered "5" is a catch all Watergate-like type of memorandum directing the conspirators and giving them free rein to do anything to intimidate, retaliate against and injure the appellant because he was a party and a witness in federal judicial proceedings by depriving him of his position as a tenured professor of law.

C. The Court below in its Memorandum and Order (App. 3-10) again failed to recognize the significance of its own findings made in paragraph two page three (App. 5) as follows:

"On September 17, 1975, the board of trustees concurred in the faculty's ultimate findings that several of the charges lodged against plaintiff had been proven, and that plaintiff's appointment be revoked. Plaintiff was then dismissed." (App. 5).

1. The foregoing finding is accurate but incomplete. The Court below failed to state the charges which were found proven which led to plaintiff-appellant's dismissal.

The said charges and findings prove by documents and not documents of appellant but documents prepared by, made, published and filed by appellees as defendants' exhibits in the Court below that appellees conspired to intimidate, retaliate against and injure appellant because he was a party and gave evidence in a court of the United States.

Documents Prepared By, Made,
Published and Filed As Exhibits In
The Court Below By Appellees

1. The said charges followed the Resolution of the board of trustees dated May 19, 1975 (App. 86, 87, 125) and alleged five charges against appellant with subdivisions.

Charges numbered "I", "II" and "III" set the tone of the proceeding and specifically refer only to the action in the United States District Court for the Eastern District of New York in which appellant was plaintiff and gave evidence. (App. 125-130).

2. Charge I as to which the Court below found that the board of trustees concurred in the faculty's ultimate findings that it had been proven and that plaintiff-appellant's appointment should be revoked (App. 5) begins with the following introductory

paragraph:

"Pursuant to a Resolution of the Board of Trustees of Brooklyn Law School made on May 19, 1975, and a Resolution of the Faculty of Brooklyn Law School made on June 5, 1975, it is alleged as follows:

"I

"That Professor William S. Herrmann, Jr. in commencing a litigation entitled William S. Herrmann, Jr. v. Raymond E. Lisle, Joseph Crea, Philip K. Yonge, and David G. Trager, in the United States District Court for the Eastern District of New York, Civil Action File No. 75Cl30, was proceeding not on reasonable grounds in the proper assertion of lawful rights, but rather that Professor Herrmann intended by said litigation wrongfully to intimidate and coerce members of the faculty and the administration of the Law School for his own advantage, in that:" (App. 125, emphasis added).

This charge I continues through five pages of allegations, which in essence deny the allegations of the complaint in the federal court. (App. 125-129).

3. Charges II and III as to which the Court below also found that the board of trustees concurred in the faculty's ultimate findings that they had been proven and that plaintiff-appellant's appointment should be revoked (App. 5) refer to the fact that appellant was a witness before the federal court in the federal action referred to in charge I wherein he was charged with misconduct for being a party and reads as follows:

"II

"That Professor William S. Herrmann, Jr., in an action commenced by him against Dean Raymond E. Lisle and Professors Joseph Crea, Philip K. Yonge, and David G. Trager in the United States District Court for the Eastern District of New York (Herrmann v. Lisle et al.), used and spread on the public record confidential memoranda addressed by a Special Committee of the Board of Trustees to the Chairman of the Faculty Hearing Committee, and by the Chairman to the members of said Committee. (emphasis added).

"III

"That Professor William S. Herrmann, Jr. refused to cooperate with a duly constituted faculty committee charged with investigating the breach of confidentiality referred to in Part II above, such refusal constituting contempt of that Committee." (App. 130).

4. Said action, Herrmann v. Lisle, et al., Docket No. 75C130 is still pending and awaiting trial in the United States District Court.

5. Charge IV follows item 4 of the board's resolution of May 19, 1975 concerning proceedings before the Committee on Fitness of Applicants for Admission to the Bar of the Supreme Court of the State of New York, Second Department, another judicial proceeding, (App. 87, 130, 131) and as to which matter the appellant was under a duty as an officer of the court to disclose such information as he knew concerning the applicant. Canon 1, Code of Professional Responsibility. Further, the Appellate Division requests such information. (App. 402).

6. Charge V is a mixture of miscellaneous allegations made pursuant to item 5 of the board's resolution dated May 19, 1975 directing the conspirators to and giving them free rein to do anything to intimidate, retaliate against and injure the appellant because he was a party and a witness in federal judicial proceedings by depriving him of his position as a tenured professor of law. For the full charge see App. 131-133.

7. Charges I, II and III and charge IV with amendment were all found proven by the faculty whose ultimate findings were concurred in by the board of trustees. (App. 156, 157). Some of the allegations of charge V were found proven by the faculty, some were found not proven and some were amended nunc

pro tunc by the faculty and found proven as so amended nunc pro tunc. (App. 157-159).

D. Appellees conspired to injure appellant for exercising his constitutional right of freedom of expression.

The Findings Of Court Below In Its
Memorandum And Order Dated October 19,
1977 Of A Conspiracy To Interfere
With Appellant's Freedom Of Expression

1. In regard to appellant's claim that he was discriminated against because of his support and advocacy of racial equality and his opposition to the practice of racial discrimination that existed within Brooklyn Law School, the Court below stated"

"Alternatively, plaintiff attempts to show membership in a class to make out 'invidious class-based discrimination'. Plaintiff proposes that because he is a champion of minority groups, the law school sought to remove him from his professorship. This appears to be more a 'class contrived for litigation' than a readily cognizable and traditionally protected class. See McClellan v. Mississippi Power and Light Co., 526 F2d 870 (CA5 1976). At best, these facts seem to present a conspiracy to interfere with freedom of expression rather than racial discrimination, see Murphy v. Mount Carmel High School, 543 F2d 1189 (CA7 1976); and, again, absent state action or a class based discrimination, such a claim is not cognizable under 42 USC section 1985(2)." (App. 9, 10, emphasis added).

2. In its conclusion that, "At best, these facts seem to present a conspiracy to interfere with freedom of expression rather than racial discrimination," the Court below failed to recognize the significance of its own findings.

3. As so well put by the Court in Puentes v.

Sullivan, 425 F. Supp. 249, 252:

"(T)his Court concludes that a private conspiracy directed toward and having the effect of denying First Amendment rights comes within the provisions of section 1985(3). The spirit of the Griffin holding and the sound reasoning from the Courts of Appeal for the Third, Sixth and Eighth Circuits compel this conclusion."

The Supreme Court has consistently held that the right to freedom of expression guaranteed by the First Amendment to the Constitution is of paramount importance. N.Y. Times v. Sullivan, 376 U.S. 254; Cox v. Louisiana, 379 U.S. 559; Williams v. Rhodes, 393 U.S. 23 and the United States Court of Appeals, Fifth Circuit, has held that the right to appear as a witness in a court is an exercise of the right of free speech as guaranteed by the First Amendment. Rainey v. Jackson State Coll., 551 F2d 672.

The cases referred to of the Courts of Appeals for the Third, Sixth and Eighth Circuits in the quote above from Puentes v. Sullivan, 425 F. Supp. 249, 252 are: Richardson v. Miller, 446 F2d 1247 (3rd Cir.); Cameron v. Brock, 473 F2d 608 (6th Cir.) and Action v. Gannon, 450 F2d 1227 (8th Cir.).

4. The importance of the right to freedom of expression has been the basis for sustaining a cause of action under 42 U.S.C. sec. 1985(3) in many courts. Cameron v. Brock, supra; Action v. Gannon, supra; Richardson v. Miller, supra; Puentes v. Sullivan, supra; Crawford v. City of Houston, Texas, 386 F. Supp. 187, 193, 194 and Pendrell v. Chatham College, 370 F. Supp. 494.

E. The Court below ignored the facts and misconstrued the law in its finding in its Memorandum and Order dated October 19, 1977 that appellant's proposition that his championship of

minority groups appeared more a class contrived for litigation than a cognizable and traditionally protected class. (App. 9, 10).

1. Appellant has alleged in his complaint filed in the Court below (App. 13-21) and set forth in his affidavit in opposition to defendants-appellees' motion to dismiss filed in the Court below (App. 306, 307) that he was discriminated against and dismissed from his position as a tenured professor of law because of his support and advocacy of racial equality and his opposition to the practice of racial discrimination that existed within Brooklyn Law School.

2. In his affidavit in opposition to appellees' motion to dismiss filed in the Court below appellant set forth specific instances in support of his allegations of said discrimination as follows:

(a) "Deponent who then was a member of the Committee on Faculty Selection recommended and urged that Mr. Leon B. Applewhaite be interviewed and seriously considered for appointment to the faculty; Mr. Applewhaite had graduated from Brooklyn Law School in 1951, also held Bachelor of Arts and Master of Laws degrees, was at the time Regional Director of the New York City office of the New York State Public Employment Relations Board, had been a secretary to a judge and had teaching experience at various institutions of higher learning." (App. 306, 307).

"The Committee on Faculty Selection refused to even grant an interview to this Black man and summarily rejected his application. Attached and made a part of this affidavit, marked plaintiff's Exhibit 56 (App. 572-579) is a letter from Mr. Lisle dated November 28, 1973, with your deponent's notations on it, circulated to the said committee and the notations of Joseph Crea, Philip K. Yonge and Henry M. Holzer together with a copy of Mr. Applewhaite's letter of application dated November 26, 1973 with his biography attached." (App. 307).

(b) "Attached and made a part of this affidavit marked plaintiff's Exhibit 57 (App. 581-584) is a copy of a letter secretly given by Mr. Yonge to Mr. Lisle concerning your deponent's activities on the said Committee on Faculty Selection. Aside from containing false statements it exudes racism." (App. 307).

3. In addition to the fact that it is basic law that on a motion to dismiss the Court must accept the allegations of the complaint as true the defendants-appellees have never denied the allegations of fact as set forth in the complaint (App. 13-21); appellant's affidavit (App. 306, 307) and the exhibits attached to said affidavit (App. 572-584) as referred to in paragraphs 1 and 2 above.

4. Appellees added to their failure to deny the foregoing matter as set forth above a ruse from which only one inference can be made. The ruse was stated in appellees', "Reply Memorandum In Support Of Defendants' Motion To Dismiss," filed by them in the Court below as follows:

"This memorandum is respectfully submitted in reply to plaintiff Herrmann's affidavit in opposition to defendants' motion to dismiss the complaint herein pursuant to Fed.R.Civ.P. 12(b). Although plaintiff, in his answering affidavit (hereinafter sometimes "Pl. Aff.") attempts to fill in some of the gaps in his cryptic complaint, such complaint is rendered no more sustainable thereby. Rather than submit another factual affidavit responding to the irrelevant details of plaintiff's affidavit, defendants are submitting this short memorandum replying to those few comments in plaintiff's affidavit which may have some bearing on the issues raised in the motion to dismiss." (App. 593, 594, emphasis added).

5. The law is clear that appellant is a member of a readily cognizable and traditionally protected class. Cameron v. Brock, 473 F2d 608; Action v. Gannon, 450 F2d 1227; Richardson

Miller, 446 F2d 1247; Puentes v. Sullivan, 425 F. Supp. 249;
Crawford v. City of Houston, Texas, 386 F. Supp. 187; Pendrell
v. Chatham College, 370 F. Supp. 494.

It is respectfully submitted that the foregoing establishes that appellant did not contrive a class for litigation and that he is a member of a readily cognizable and traditionally protected class.

Point II

THE FACTS PRESENTED TO THE COURT BELOW ARE
UNCONTRADICTED BY APPELLEES AND CLEARLY ESTABLISH A CONSPIRACY UNDER COLOR OF LAW.

The defendant Thompson as a Justice of the Supreme Court of New York functioning as Administrative Judge of the Civil Court of the City of New York "possessed power by virtue of state law and made it possible for him to do what he is charged with doing. United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 89 L. Ed. 1368 (1940), Screws v. United States, 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L. Ed. 1495 (1940)." Spires v. Bottorff, 317 F 2d 273. Thus his acts and actions were "under color" of law.

The defendant Thompson was the nexus to and with the acts and actions of the other defendants-appellees making the conspiracy to deprive the appellant of his Civil and Constitutional rights one "under color of law." U. S. v. Price, 383 U.S. 787; Adickes v. S. H. Kress & Co., 398 U.S. 144. As consistently held by the Supreme Court:

"To act 'under color' of law does not require that the accused be an officer of the State. It is

enough that he is a willful participant in joint activity with the State or its agents." U.S. v. Price, 383 U.S. 787, 794; Adickes v. S. H. Kress & Co., 398 U.S. 144, 152.

The Court below in its Memorandum and Order dated October 19, 1977 found the conspiracy (App. 10) and that it "is conceivable that the alleged activities of the state judge here might be considered to be 'under color of state law' since the judge allegedly pressured plaintiff to discontinue his defamation action in state court." (App. 8).

The Court below in its Memorandum and Order dated October 19, 1977 then goes on to find that appellant was not damaged in the state court defamation suit by these acts of the state judge and that these actions of the said state judge, as detailed in the complaint are unrelated to appellant's dismissal as a tenured professor of law. (App. 8,9).

A. The Court below failed to recognize the significance of its own findings; disregarded the sworn uncontradicted evidence and documentary proof below and misconstrued the law.

1. The statement of the Court below in its Memorandum and Opinion dated October 19, 1977 that, "the judge allegedly pressured plaintiff to discontinue his defamation action in state court" overlooks and greatly understates the actions of Judge Thompson.

2. Judge Thompson improperly interfered in the Civil Court case and coerced and threatened appellant to withdraw that case and acted in concert in doing this with the other defendants-appellees. Appellant was ordered to appear in Judge Thompson's office on October 2, 1973 with regard to the Civil Court case by the defendant-appellee Raymond E. Lisle, appellant's

supervisor. (App. par. (b) p. 303, 548-553). Appellant could not appear on that day as he was ill and telephoned Mr. Lisle's private secretary asking her to so advise Judge Thompson. Shortly thereafter Mr. Lisle's secretary telephoned appellant and advised him that he was ordered to telephone Judge Thompson at once and gave appellant his private telephone number. (App. par. (e) p. 304).

3. Appellant telephoned Judge Thompson and Judge Thompson said, "I want a withdrawal of your action from you and I want it right now; I have news for you, your case is going nowhere, I have spoken to Judge Kleiger and all of the Judges in Brooklyn know or will know about this case and you are going to lose it; the Board of Trustees (of Brooklyn Law School) are tired of your nonsense in bringing this action and they want it withdrawn and I am ordering you to withdraw it today." (App. 304, 305). Judge Thompson then ordered appellant to appear in Judge Kleiger's chambers at a later date. (App. 304, 305, see also App. 560).

4. Appellant thereafter appeared in Judge Kleiger's chambers and Judge Kleiger said, "I have had discussions with Judge Thompson concerning this matter and I am telling you, you had better withdraw your lawsuit or you will be in serious trouble at the law school. You will not get five cents recovery in your lawsuit and you better drop it." (App. 305).

5. During all of the foregoing time a motion by appellant to preclude Mr. Crea from giving evidence on his \$200,000.00 counterclaim in the Civil Court action was pending before Judge Kleiger. (App. 547). This motion was made because Mr. Crea refused to disclose the basis of his allegations that appellant made alleged statements which were slanderous and were

directed to Mr. Crea. (App. 547).

6. Judge Kleiger after some time denied the motion to preclude seriously damaging appellant because to defend the \$200,000.00 counterclaim this information was vital and it led appellant's attorneys to subpoena the defendant-appellee Elbaum to obtain said information after which a motion for summary judgment was made by appellant and Mr. Crea's \$200,000.00 counterclaim was dismissed. (App. 277, 310).

7. The subpoenaing of Elbaum led to further conspiracies between Judge Thompson in his judicial capacity and the other defendants-appellees.

(a) Judge Thompson in his official capacity and his co-conspirators secretly took steps to deter appellant's attorneys from taking Elbaum's deposition and Judge Thompson in his official capacity took steps to have his chief law assistant, Mr. Boyer, accompany Elbaum at the deposition. (App. 325, 326).

(b) During all of the foregoing period Judge Thompson as a judge was in the forefront of meetings of the faculty, the board of trustees and the administration to create ill will against appellant and to put him in a bad light with the faculty and board of trustees. (App. 322-326).

(c) Had Judge Thompson not interfered in the Civil Court action in his official capacity and led the faculty and board of trustees in trying to defeat appellant and prevent him from obtaining evidence and from defending against the \$200,000.00 counterclaim, the case would have been disposed of in due course as an ordinary case and no further proceedings would have taken place either in a court or in Brooklyn Law School.

(d) Judge Thompson's interference in his official capacity and his involvement with the Civil Court action and his official action concerning Elbaum was the basis for and the causal relationship for the pyramiding of the ill will by the defendants-appellees against appellant.

8. In addition to the foregoing:

(a) Judge Thompson as a member of the board of trustees authorized the charges prepared and made against appellant including those concerning the action in his court and in the federal court action.

(b) Judge Thompson in his official capacity as Administrative Judge of The Civil Court of the City of New York was a witness against appellant in the disciplinary proceedings before the faculty authorized by himself as a trustee. (App. 555).

(c) Judge Thompson participated in and authorized the denial to appellant's attorney of an adjournment and in effect appellant's representation by counsel at the disciplinary hearing. (App. 464-470).

(d) Judge Thompson after taking all of the foregoing actions then sat as judge and jury on the charges, including those related to the court over which he was Administrative Judge and the federal court and concurred in the findings of the faculty and board and aided with the sentence and execution.

9. (a) The statement by the Court below that the attempts by Judge Thompson as a judge to injure appellant in the Civil Court case were unsuccessful and no damages accrued to appellant is astounding.

(b) The statement that the actions of the ad-

ministrative judge are unrelated to the dismissal of the appellant as a tenured professor of law is equally astounding.

(c) Judge Thompson as a judge with the resources and power of his office behind him was the cohesive force holding the appellees together and leading them in their conspiracy.

B. Of strong significance and a fact which the Court below apparently overlooked is that neither Judge Thompson nor any of the other defendants-appellees ever denied any of the serious charges made by appellant against Judge Thompson and his co-conspirators although they have had ample time and opportunity to do so.

It is submitted that the clear presumption arising from the failure of the submission of even one affidavit by Judge Thompson or his cohorts to the Court puts Judge Thompson and his actions under "color of law" together with those of his co-conspirators in the proper light.

C. In addition to the foregoing, damages may be presumed from a denial of a Constitutional right. Hodge v. Seiler, 558 F2d 284 and there are only two requirements to establish a civil rights action under Section 1983 of the Civil Rights Act: (1) state action or action under color of law, (2) deprivation of rights guaranteed by the Constitution and laws of the United States. No more is needed. Wirth v. Surles, 562 F2d 319; Jacobson v. Tahoe, 558 F2d 928. Of course, this applies equally to actions for damages under color of law under the other sections of the Civil Rights Law.

D. It is submitted that the Memorandum and Order of

the Court below dated October 19, 1977 and its findings and conclusions in addition to the foregoing matter set out in this brief are inconsistent and lead to a Procrustean situation.

(a) On the one hand the Court below concludes that appellant has no cause of action for the private conspiracy to intimidate, retaliate against and injure him because he was a party and a witness in a court of the United States because the first action he brought was in a state court.

(b) On the other hand, the Court below concludes that the acts done under "color of law" by the appellees to deprive appellant in the said state court action of his Constitutional, statutory and civil rights did not damage him and he, therefore, has no cause of action here either.

Point III

THE COMPLAINT SHOULD NOT HAVE BEEN DIS-
MISSED BY THE COURT BELOW.

The law is well established: that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief: Conley v. Gibson, 355 U.S. 41, 45, 46; Egelston v. State University College at Geneseo, 535 F2d 752; that civil rights claims should be liberally construed; Roberts v. Acres, 495 F2d 57; Birnbaum v. Truseck, 371 F2d 86; and that a case brought under the Civil Rights Act should not be dismissed at the pleading stage unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. Scher v. Board of Education of West Orange, 424 F2d 741,

744; Wirth v. Suries, 562 F2d 319.

It is submitted that there has been set forth in the complaint and documents filed below enough evidence and material to satisfy the requirements of the foregoing cases many times over and that appellant should not be denied his day in court at this stage of the proceedings.

Conclusion

For the foregoing reasons appellant respectfully submits that the Order and Judgment of the Court below, "that plaintiff take nothing of the defendants and that the complaint is dismissed," be reversed.

Respectfully submitted,

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New York, New York 10017
Tel. No. (212) 279-6995

ADDENDUM

42 USC sec. 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USC sec. 1985(2) Obstructing justice; intimidating party, witness or juror.

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

42 USC sec. 1985(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-6184

WILLIAM S. HERRMANN,

Plaintiff/Appellant

-against-

AFFIDAVIT OF SERVICE

LEONARD P. MOORE, etal

Defendants/Appellees

STATE OF NEW YORK)

) s.j.:

COUNTY OF NEW YORK)

VINCENT SICA, being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside at
Carpenter Road, Chester, New York 10918.

On December 21, 1977, I served a true copy of the Appendix for Appellant
and Brief for Appellant in the following manner:

By delivering the same personally to the persons and at the addresses
indicated below:

Cahill, Gordon & Reindel, Esqs.,
Attorneys for Defendants/Appellees
80 Pine Street
New York, New York 10005

by delivering a true copy of each with

Thomas Doyle, Jr.

Vincent Sica
VINCENT SICA

Sworn to before me this 21st
day of December, 1977

Gloria McGeady
GLORIA McGEADY
Notary Public, State of New York
Qualified in Orange County
Term Expires March 30, 1979

